

1674. June 13.

RICHARDSON *against* PALMER.

## No 54.

The act 1661 not extended against the husband of the apparent heir, unless the right acquired, tho' in the husband's name, is for the wife's behoof, or acquired by her means. See No 52. p. 5310.

WILLIAM RICHARDSON pursues Christian Palmer, to hear and see it found and declared, that an apprising led against her father, albeit expired, is to be purged by payment of the true sums that she paid for the same, it being acquired by her who is apparent heir, or by her husband, to the effect that the pursuer as creditor may affect the lands. The defender *alleged* that member of the libel was not relevant, that the husband acquired, not being so expressed in the act of Parliament 1661, betwixt debtor and creditor, on which this pursuit is founded, and the statutes being *stricti juris*, cannot be extended any further than the cases exprest. It was *answered*, That if this were sustained it would elide the act of Parliament, as to all heirs-female, and therefore it ought to be extended to this, being an equivalent case.

THE LORDS having examined upon oath Hallyards, who was alleged to have granted right to the husband, and likewise the husband himself as to the manner of acquiring of this apprising; by their oaths it appeared that Hallyards had acquired the right of the apprising at the desire of the apparent heir's husband, and that he had taken the assignation blank in the assignee's name, which remains yet so in his hands, and that he had promised to fill up the husband's name therein upon payment of the principal sum and annualrent contained in the apprising, but that the price was not yet paid, nor the name filled up, but that the husband had paid the annualrent thereof for some time, and that the land was better than these sums, and that he had not given any ease to the husband upon the account of the wife's propinquity of blood, or to the wife's behoof, or by her means, but upon his kindness to the husband.

THE LORDS having formerly sustained the libel on these terms, that the right acquired, though in the name of the husband, was to the behoof of the wife, and that she was to be fiar therein, or that it was acquired by her means and money, or that the ease was granted upon the account of her propinquity of blood; they found none of the members of the condescendence proven, and therefore assolizied.

*Fol. Dic. v. 1. p. 360. Stair, v. 2. p. 271.\**

1675. February 17.

M'LURG *against* GORDON.

## No 55.

An apprising of a predecessor's estate was found not redeemable from the apparent heir, who had acquired it

JOHN M'LURG smith, pursues John Gordon, as behaving as heir to his father, for payment of 400 merks, and insists against him, as behaving by intromission with the rents of his lands. The defender *alleged* absolvitor, because his intromission was by virtue of an apprising led against his father, whereunto he had right. It was *answered*, that by the act of Parliament betwixt debtor and creditor, apprisings acquired by apparent heirs are redeemable by creditors for the

sums they truly paid. It was *answered, non relevat*, because the defender acquired the apprising when he was not apparent heir, having then an elder brother living. It was *replied*, That the elder brother was out of the country, and that the appriser did dispone the apprising for small sums to the second brother, upon account of his blood and relation; and there is like reason to prevent fraud in this case, as if the defender had been immediate apparent heir.

THE LORDS found that the act of Parliament could not be extended to this case.

*Fol. Dic. v. 1. p. 360. Stair. v. 2. p. 324.*

\* \* \* Gosford reports the same case :

IN a pursuit at ——— instance against ——— representing his brother, for payment of his debts, upon that passive title that he had intromitted with rents of lands wherein his brother died infest, as apparent heir; it was *alleged* for the defender, That he could not be liable upon that passive title, because he had acquired a right to a comprising of his brother's estate, in his brother's lifetime, and so could not be apparent heir, which is only sustained against those which are *in linea decendente*, but not of collateral line. This allegiance being sustained, it was then craved that the pursuer, being a lawful creditor, might have the benefit of the act of Parliament anent debtor and creditor, that he might redeem from the defender for that sum he paid for the right of the comprising, seeing by the death of the brother without heirs, he is now apparent heir. THE LORDS having considered the act of Parliament, did find that the defender's right did not fall within the same, nor could be redeemed by a creditor, because he was not, nor could be, interpreted an apparent heir, having acquired that right during his brother's lifetime, who might have had other heirs of his own body, and the act of Parliament can only be interpreted of such apparent heirs who necessarily may succeed.

*Gosford, MS. No 749. p. 462.*

1677. January 9.

HAY against GREGORIE and Others.

HAY of Moldovat being infest in an annual rent out of certain lands of the estate of Frendraught, pursues the tenants thereupon for payment, who have raised a double poinding against David Gregorie, the Lord Frendraught, Ogilvie and others; who compear and *allege*, That their right to the lands in question is by expired apprisings and infestments, prior to the pursuer's infestment.—It was *answered*, That these apprisings were now come in the person of Lord Frendraught, who is apparent heir, and therefore may be taken off by any creditor within ten years of the acquisition, conform to the act of Parliament 1661 betwixt debtor and creditor.—It was *replied*, That this act gives only the benefit unto the posterior apprisers.—It was *duplicated* for the pursuer, That as to this clause of the act, the *ratio legis* expressed in the narrative is general, ' the

No 55.  
while he was  
only a se-  
cond brother,  
and not appa-  
rent heir.

No 56.  
The right  
of redemp-  
tion from the  
apparent heir,  
of expired  
apprisings  
purchased  
by him, ex-  
tended in fa-  
vour of credi-  
tors, who had  
not apprised.  
See No 50.  
P 5306.